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No. 863

In the Supreme Court of the United States

OCTOBER TERM, 1960

UNITED STATES OF AMERICA, PETITIONER

v.

THE ABSENTEE SHAWNEE TRIBE OF OKLAHOMA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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CITATIONS

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THE ABSENTEE SHAWNEE TRIBE OF OKLAHOMA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Claims.

OPINION BELOW

The opinion of the Indian Claims Commission (App., *infra*, pp. 9–22) is reported at 6 Ind. Cl. Comm. 395. The order of the Court of Claims (App., *infra*, pp. 7–8) is not reported.

JURISDICTION

The judgment of the Court of Claims was entered November 2, 1960 (App., *infra*, pp. 7–8). A timely motion for rehearing was overruled on January 18, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1255. And see Section 20(e) of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 1054, 25 U.S.C. 70s.

QUESTION PRESENTED

Whether, under the Indian Claims Commission Act, an Indian tribe is now entitled to additional compensation, equivalent to interest, because payments by the United States provided by treaty for the surrender of tribal land were made (at the Indians' insistence) in installments rather than as a lump sum at the time of the treaty.

TREATY PROVISION AND STATUTE INVOLVED

Article 3 of the Treaty of 1854 with the Shawnee Tribe provides (10 Stat. 1053, 1056):

> In consideration of the cession and sale herein made, the United States agree to pay to the Shawnee people, the sum of eight hundred and twenty-nine thousand dollars, in manner as follows, viz: Forty thousand dollars to be invested by the United States, at a rate of interest not less than five per centum per annum, which, as it accrues, is to be applied to the purposes of education; that amount, with the addition of the three thousand dollars of perpetual annuities provided by the treaties of August third, one thousand seven hundred and ninety-five, and September twenty-ninth, one thousand eight

> hundred and seventeen, and now hereby agreed to be likewise so applied, together with the sum to be paid by the Missionary Society of the Methodist Episcopal Church South, as herein after provided, being deemed by the Shawnees as sufficient, for the present, for such purposes. Seven hundred thousand dollars, to be paid in seven equal annual instalments, during the month of October of each year, commencing with the year one thousand eight hundred and fifty-four; and the residue of eighty-nine thousand dollars, to be paid within the same month of the year, after the termination of that period.

The Indian Claims Commission Act of August 13, 1946, Section 2, 60 Stat. 1050, 25 U.S.C. 70a, provides in part:

* * * * * *

> In determining the quantum of relief the Commission shall make appropriate deductions for all payments made by the United States on the claim, and for all other offsets, counterclaims, and demands that would be allowable in a suit brought in the Court of Claims under section 250 of Title 28 * * *.[1]

STATEMENT

The Indian Claims Commission found that the fair market value of lands ceded by the respondents to the United States in 1854 was $1,938,000. The consideration of $829,000 was, the Commission held, unconscionable and it entered judgment for the difference. As to the issue here involved it said (*infra*, pp. 20–21):

[1] Now covered by Sections 1491, 1496, 1501, 1503 and 2501 of Title 28.

By Article 3 of the Treaty of May 10, 1854, 10 Stat. 1053, by which the Shawnee Indians ceded their lands to defendant, the United States agreed to pay $829,000 in cash for the cession in the following manner: $40,000 to be invested by the United States, at a rate of interest not less than five per centum per annum; seven hundred thousand dollars to be paid in seven equal installments commencing in 1854 and $89,000 additional following the termination of that period. Petitioner contends that the United States should not be allowed to charge against the Swanees the full $829,000.00 but rather the consideration paid should be valued at its present worth as of the date of the treaty of cession, or $635,265.66. This method of attempting to reduce the actual consideration paid under the provisions of a treaty was rejected by this Commission in *The Crow Tribe* v. *The United States*, 6 Ind. Cl. Comm. 98, 124, 125, as an attempt to obtain interest where none was provided for or could be allowed. In the negotiation of the Shawnee treaty of 1854, here involved, it should be pointed out, the question of the number of payments under the treaty was a matter of bargaining between the parties with the United States finally agreeing to the number insisted upon by the Indians.

By order of November 2, 1960, the Court of Claims reversed this holding and added $193,700 to the judgment. It said (App., *infra*, p. 7):

> The Commission erred in valuing the consideration by totaling the payments made to the Tribe over a period of time, rather than by

determining the present value, as of the date of cession of the Tribe's lands, of the right to receive such payments in the future. *The Miami Tribe of Oklahoma* v. *United States*, Appeal No. 2–59, decided July 15, 1960; *The Crow Tribe of Indians* v. *United States*, Appeal No. 1–59, this day decided.

REASONS FOR GRANTING THE WRIT

The petition for a writ of certiorari, filed at the same time as this petition, in *United States* v. *Miami Tribe of Oklahoma, et al.*, states the reasons why the new discount rule of the Court of Claims should be reviewed by this Court. See also the petition in *United States* v. *The Crow Tribe of Indians*.

In this case, too, it is plain that the Court of Claims is simply employing a mathematical process of discounting, without regard to the circumstances of the particular case. As in the *Miami* and *Crow* cases, there was here no default by the United States, but rather exact performance of the treaty provision. And, as the Commission found, the installments were fixed at the insistence of the Indians. Certainly, neither legal or equitable reasons can be given for holding that, contrary to such insistence, the United States should have paid the Indians in a lump sum in 1854 and should now be charged $193,700 for not having done so.

Moreover, the discount is made, not in determining whether the consideration for the cession was unconscionable, but in computing the amount the United States has paid upon the claim. The statute vests no

discretion in the Court of Claims to allow credit for only part of the payments made upon the claim (see *supra*, p. 3). But that, we submit, is the effect of the Court of Claims' order in this case.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

ARCHIBALD COX
Solicitor General.

ROGER P. MARQUIS,
Attorney.

MARCH, 1961.

APPENDIX A

In the United States Court of Claims

App. No. 9–59

THE UNITED STATES OF AMERICA

v.

THE ABSENTEE SHAWNEE TRIBE OF OKLAHOMA AND RILEY M. HOOD ON BEHALF OF THE SHAWNEE NATION

ORDER

This case comes before the court on cross-appeals from a decision of the Indian Claims Commission (Docket No. 334). Upon consideration thereof, together with the record made before the Commission and the briefs and argument of counsel, it is concluded that the amount of recovery is to be increased by $193,734.34, which is the amount by which the Indian Claims Commission overvalued the consideration received by the petitioners below. The Commission erred in valuing the consideration by totaling the payments made to the Tribe over a period of time, rather than by determining the present value, as of the date of cession of the Tribe's lands, of the right to receive such payments in the future. *The Miami Tribe of Oklahoma* v. *United States*, Appeal No. 2–59, decided July 15, 1960; *The Crow Tribe of Indians* v. *United States*, Appeal No. 1–59, this day decided.

It is therefore ordered, this second day of November, 1960, that said decision by the Indian Claims

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Commission be and the same is modified in accordance with the above, but affirmed in all other respects, and the case is remanded to the Commission for the entry of an appropriate order.

By the Court:

MARVIN JONES,
Chief Judge.

APPENDIX B

Before the Indian Claims Commission

Docket 334 Amended

THE ABSENTEE SHAWNEE TRIBE OF OKLAHOMA AND RILEY M. HOOD ON BEHALF OF THE SHAWNEE NATION, PETITIONERS

v.

THE UNITED STATES OF AMERICA, DEFENDANT

Decided: June 19, 1958

Appearances: JACK JOSEPH, A. ABRAHAM ZIEDMAN, LOUIS E. ROCHMES, attorneys for petitioners.

W. BRAXTON MILLER, with whom was Mr. Assistant Attorney General PERRY W. MORTON, attorneys for defendant.

OPINION OF THE COMMISSION

O'MARR, *Commissioner,* delivered the opinion of the Commission.

The lands for which claim is made are part of a tract the defendant ceded the Shawnee Nation or Tribe of Indians by the Treaty of November 7, 1825, 7 Stat. 284, and was for the benefit of the part of the tribe then living in the State of Missouri and those members or branch of the tribe who were then living in the State of Ohio and who might emigrate west of the Mississippi River to the lands ceded to the Nation by the Treaty of November 7, 1825.

Later, and on August 8, 1831, 7 Stat. 355, the Ohio part of the tribe ceded their Ohio lands and the defendant granted them part of the lands it gave the tribe by the Treaty of November 7, 1825. Thereafter, the two branches of the Shawnee Nation united on the lands ceded to them by the 1825 treaty and thereafter the Shawnee lands were held in common.

By the Treaty of May 10, 1854; 10 Stat. 1053, the united tribe of Shawnee Indians ceded to the United States all the lands acquired from the United States by said treaties of November 7, 1825, and August 8, 1831. And by the Treaty of May 10, 1854, the United States re-ceded to the Shawnee 200,166 acres of their lands. More about this later. So there is no question of title involved in this case and the sole issue to be now decided is whether the consideration the defendant paid the Shawnee for their lands in 1854 was unconscionable.

The amended petition in this case was filed by The Absentee Shawnee Tribe of Oklahoma and Riley M. Hood on behalf of The Shawnee Nation, petitioner. The petition had been amended to sever certain claims not pertinent to the issues here involved. In amending the petition, petitioner dropped as named parties The Eastern Shawnee Tribe of Oklahoma and certain named individuals. While defendant does not controvert that the Shawnees are an identifiable tribe of Indians which, through proper representatives, is entitled to prosecute this claim on behalf of those Indians having an interest therein, defendant did object to petitioner dropping the Eastern Shawnee Tribe of Oklahoma and all but one of the personal representatives, since such exclusion was not authorized by the Commission (Def. Br., pp. 1 and 2). Petitioner agrees that this claim is brought on behalf of The Absentee Shawnees and on behalf of such other

descendants or successors of the Shawnee Tribe or Nation (as it existed in 1854) as may be entitled to participate in any recovery herein. (See Pet. Prop. Fdg. No. 1.) Petitioner, The Absentee Shawnee Tribe, is an organized group recognized by the Secretary of the Interior (Pet. Ex. No. 286), and as such has the capacity to maintain this claim for and on behalf of such descendants of the Shawnee Tribe, conceded to be an identifiable tribe by defendant, who may be entitled to participate in any recovery herein. The contentions made by defendant would seem to raise some question as to the right of the absentee Shawnees to participate in any recovery as to the Shawnee Reservation but their rights were expressly recognized in the Treaty of May 10, 1854 (10 Stat. 1053). While the elimination of the Eastern Shawnee Tribe of Oklahoma as a party petitioner was made by petitioner without sanction of the Commission, the rights, if any, of the members of that group to participate in any recovery respecting the claim now presented as descendants of Shawnee Indians having an interest in The Shawnee Tract ceded in 1854 are protected by petitioner's agreement that this action is brought on behalf of themselves and in behalf of such other descendants or successors of the Shawnee Tribe or Nation (as it existed in 1854) as may be entitled to participate in any recovery herein.

The lands involved in this case are located in what is now the State of Kansas. The area includes all of present-day Johnson County and greater or lesser parts of Douglas, Shawnee, Osage, Miami, Franklin, Wabaunsee, Lyon, Morris and Geary counties. The Shawnee Tract was approximately 25 miles wide from north to south and 120 miles from east to west. The Kansas River formed the northern boundary line for a distance of about 60 miles from east to west. The

State of Missouri adjoined the lands on the east. The great Santa Fe Trail ran through most of the Tract and a branch of the California Road passed through part of these lands.

The Shawnee Tract consisted of 1,604,956 acres all of which were technically ceded to the United States by the Treaty of May 10, 1854. Under the provisions of the treaty, the United States re-ceded 200,166 acres to the Shawnee Indians who were to make selections within a 30-mile limit west from the boundary of the State of Missouri. It is agreed by the parties that the acreage to be evaluated consists of 1,404,790 acres.

The parties agree that there existed between the approximately eastern two-thirds of the tract and about the western one-third certain geographical, topological and historical considerations which make it necessary to consider the two portions separately. While the defendant's appraiser estimated the western portion to contain roughly 500,000 acres, the Commission has concluded that petitioner's figure of 472,652 acres in the western portion is closer to the total that should be thus included therein. The eastern two-thirds of the Shawnee Tract consisted of 932,138 acres.

Petitioner bases its "evaluation of the Shawnee Tract on the actual market for lands in two comparable tracts, the Delaware trust tract to the north and the Peoria trust tract to the south of the Shawnee lands." The sales of these two tracts and their relationship to the valuation of The Shawnee Tract will be discussed hereinafter. Defendant did not consider the disposition of the Delaware and Peoria trust lands "because of differences in location, time and intervening factors rendering the results not only unknown by unforeseeable as of 1854." Defendant states that the most direct facts in the valuation of the Shawnee lands were the record and patterns of

sales of comparable and adjacent lands in Missouri up to the date of taking. The sales referred to by defendant were sales of public lands by the United States.

Thus we have a difference in views as to the market data to be used in valuing the Shawnee Tract. While much of the lands immediately adjoining the Shawnee Tract in the State of Missouri had been settled for years there is no evidence as to free or private sales of unimproved lands in that area. Petitioner has built a China wall around the Delaware and Peoria sales in 1856 and 1857 and contends that they are controlling for the 1854 evaluation of the Shawnee Tract offering no evidence as to what the sales data may have been in 1854 or prior thereto in nearby lands. Defendant on the other hand erects just such a barrier to the consideration of anything that happened subsequent to the valuation date and as to sales in 1854 or prior thereto limits its market data to Government disposals of land especially in the adjacent State of Missouri. While the sales contended for by the parties are factors to be considered in valuation of The Shawnee Tract, none of them are in themselves controlling.

It is necessary first to consider the weight to be given to opinion evidence in these valuation cases before the Commission because of the positions taken by the parties to this action. Defendant's counsel states on page 18 of his brief:

> The petitioners in this case flatly present the question as to whether appraisals should be made by real estate experts or by lawyers and judges or commissioners, appointed solely on the basis of legal ability. No lawyer, or judge, because competent to test, weigh and apply evidence in a malpractice suit, would undertake

> an appendectomy. The distinction is less obvious here, but ignoring it may well prove as financially disastrous in the one case as it would certainly be physically in the other.

And further in defendant's brief it is stated:

> Conversely where, as in the case of defendant's witnesses here the opinion of an expert is based on sound factors and is sustained by all of the relevant evidence, that opinion should be accorded "the force of fact," (citing cases).

The defendant's position would seem to be that the Commission is to be bound by the opinion of the expert in any case where such opinion might be uncontradicted. Such is not the law. In *The Miami Tribe of Oklahoma et al.*, v. *The United States*, 4 Ind. Cl. Comm. 346, 401, Chief Commissioner Witt wrote as follows:

> The purpose of submitting the reports and testimony of real estate appraisers is to aid the Commission in making this determination. The determination itself, however, is to be made by the Commission on the facts established by the evidence. An appraisal by an expert is not more than his opinion. Opinion evidence is received when the person is a qualified expert in his field, however "opinion evidence is not evidence of a fact." The weight to be given to opinion evidence depends upon the qualifications of the witness in the field in which he testifies and whether he takes all relevant factors into account and the correctness of the facts, upon which the opinion evidence is based; and whether the assumptions made by the witness are proper and supported by facts. The appraisal can only be properly evaluated by giving consideration to the qualifications of the witness and in the light of the true facts upon which based.

While, as stated above, the determination itself is that of the Commission, the opinions of experts must be considered and given such weight as in view of all the circumstances, reasonably attaches to them. See 20 Am. Jur. Sections 1206, 1207 and 1208.

The above contentions made by defendant stem, it would appear, from the fact that petitioner did not offer the testimony or opinion of an appraiser. While the testimony, reports and opinions of appraisers have proven of great value in the cases determined by this Commission, it does not follow that the lack of such testimony on behalf of a petitioner tribe should preclude a determination on value for a claimant if evidence sufficient to prove unconscionable consideration is introduced by the party in the case.

The parties agree that the fair market value approach is the method to be used in valuation of the Shawnee Tract. They disagree, however, as to the market data to be used in using this method of appraisal as previously noted above. Petitioner relies on the standards for ascertaining value set forth by this Commission in *Osage Nation* v. *United States*, 3 Ind. Cl. Comm. 331, cited with approval in *Otoe and Missouria Tribe* v. *United States*, 131 C. Cls. 593, cert. den. 350 U.S. 848. In the *Osage* case, supra, the Commission made findings of fact with respect to the various factors usually considered in valuation cases such as settlement, transportation, topography, and sales and appraisals of Indian lands in Kansas. In determining the value in the *Osage* case the Commission gave great weight to the appraisal of an adjoining tract comparable in size, location, time and character. It should be stressed, however, that in the *Osage* case other factors were weighed such as the fact that the same economic and

population conditions prevailed as to the two tracts. In addition, there was much evidence with respect to sales both prior to and subsequent to the Osage cession to assist the Commission in reaching its determination.

Petitioner urges that the appraisals and sales of the Delaware Trust Lands and Peoria Trust Lands are controlling in the instant case since a statistically valid comparison can be made of the Shawnee lands and the sales price of the Peoria and Delaware lands, "which were sold on a relatively free market, * * *."

The final appraisal of the Peoria lands showed an average value of $1.66 per acre for 208,585 acres of such trust lands. These lands sold in a very short period in 1857 at an average price per acre of $1.67 per acre. The final appraisal of the eastern Delaware lands showed an average value of $1.79 for 217,515 acres appraised while the western Delaware trust lands consisting of 343,326 acres were appraised at an average value of $1.65 per acre. The Delaware Trust lands sold for about $1.88 per acre. The fact that the average sales price per acre of the Delaware and Peoria Trust lands was only slightly higher than the average appraised value is not indicative of what they would have brought on the open market in many instances. Most of the trust lands were claimed by settlers and speculators prior to appraisal and sale, associations were formed by settlers to protect their claims, and bona fide settlers were allowed to purchase at the appraised value. Many of the "bona fide settlers" were but speculators who obtained their lands at the appraised value. Petitioner contends there are four points of comparability between the three tracts—location, character, time of cession, and size. As to location, the three were favorably located with the Delaware and Shawnee having the ad-

vantage of being accessible to water transportation. As to size, the tracts were not as comparable since the Peoria trust lands consisted of 208,000 acres and the Delaware Trust lands amounted to about 560,000 acres while the Shawnee Tract contained 1,404,790 acres. In the character of land the two tracts were comparable with the eastern Shawnee lands. As to time, the comparability is questionable. Although the treaties with the Peoria, Delaware and Shawnee Indians were all negotiated in May 1854, the appraisals and sales of the Peoria and Delaware Trust lands occurred in 1856 and 1857. If conditions had remained anywhere near normal then time as a factor might be comparable. Although there was a strong demand for opening Kansas to settlement in 1854, it is not believed that the great rush to obtain these Kansas lands could have been foreseen in 1854. An excerpt from The Topeka (Kansas) Tribune is quoted in *The Kansas and Nebraska Handbook* for 1857–8 (Pet. Ex. 155) which stated: "We had anticipated a very large emigration, but the realization is beyond all our preconceived ideas." It must be remembered that in 1854 there were no settlements in Kansas at the time of the cessions but that by 1856 and 1857 when the appraisals and sales of the Delaware and Peoria lands took place practically all the trust lands had been claimed by settlers or speculators. So conditions had changed in the time interval and most assuredly would affect value. This does not mean that because of the change in conditions the appraisals and sales of the Delaware and Peoria trust lands are not entitled to great weight because not altogether comparable in time. It only means that adjustment must be made in weighing these sales to compensate for what could not have been foreseen.

As noted above, the Commission believes the tracts

are not comparable in size. In contending that these tracts were of the same size petitioner would obtain such comparability because the quarter sections or less sold within the three tracts were of comparable size. The comparability between tracts in a determination of value, however, is otherwise. In *The Pottawatomie Tribe of Indians, et al.*, v. *The United States*, 3 Ind. Cl. Comm. 40, at page 60 this Commission stated:

> It is well established that a sale of a large tract of land as a unit brings far less than when sold in small tracts. A prospective purchaser in 1868 would have to take into consideration the risk involved as to the future economic condition of the country and whether there would be a continuing demand for the land in the area. He would also consider the length of time it would take to dispose of all the land and the costs of sale, so that in the end he would realize a profit.

In determining the issue of value in cases before this Commission, due consideration is given to all facts which would, or could have been known, to a willing buyer and willing seller at or about the time of the purchase. While in these cases the willing buyer and willing seller are hypothetical persons it is necessary to consider those factors which would have been uppermost in the minds of such hypothetical persons, including the size of the tract, the highest and best use or uses for which it was suitable, demand, prospects and risk.

In petitioner's brief it is stated petitioner feels the United States should have appraised the Shawnee Tract by classifying the lands and separately evaluating tracts of a quarter section or less. This seems to tie in with petitioner's further contention that the United States owed the Indians a duty to sell the

lands for them or enable the Indians themselves to sell the lands to the best of their advant ge. With respect to these contentions it is only necessary to point out that the United States did offer to sell the lands of the Shawnee Tract for the Indians but this offer was rejected by the Indians during negotiation of the treaty for the reason as stated by one of their delegates as follows:

> They reject this last proposition. They would rather let the land go at once, and know what they get for it. The whites would flock in—some of the land might not be sold at all. That plan they let drop. Asks about the first proposition.

In any event, what the Shawnee tribe is entitled to is the difference between the consideration paid, if unconscionable, and the fair market value of the Shawnee Tract as a whole at the date of acquisition by the United States. They are not entitled to a recovery based on what the lands of the tract may have brought if sold in small units of a quarter section or less for their benefit.

Only a brief discussion is necessary with respect to the defendant's witnesses. Doctor William G. Murray, a qualified appraiser, appeared as an expert witness for defendant and also prepared a written report containing much valuable information (Def. Ex. 1). Mr. Richard B. Hall, a qualified appraiser, testified for defendant but did not submit a report. There is very little actual disagreement with many of the factors considered by Doctor Murray and petitioner, such as character of the land, transportation, climate, water, the importance of timber, and location of the land. The sales considered by defendant's experts were solely those made by the Government. While these are important, as pointed out by Doctor

Murray, to indicate a pattern of settlement and to show the type of land desired by the settler, thus showing the importance of water, timber and location, they are not as indicative as the subsequent sales of the Peoria and Delaware trust lands in a relatively free market are in determining value in this case. The sales of the trust lands were not considered by defendant's appraisers because of the difference in time and intervening factors. Doctor Murray felt that the trust lands were sold in a boom time. As far as comparable sales are concerned, the only sales considered by defendant's appraisers upon which their opinion of value could be pegged were Government sales. Sales of public lands are controlled sales and thus may not be used alone to establish fair market value.

By Article 3 of the Treaty of May 10, 1854, 10 Stat. 1053, by which the Shawnee Indians ceded their lands to defendant, the United States agreed to pay $829,000 in cash for the cession in the following manner: $40,000 to be invested by the United States, at a rate of interest not less than five per centum per annum; seven hundred thousand dollars to be paid in seven equal installments commencing in 1854 and $89,000 additional following the termination of that period. Petitioner contends that the United States should not be allowed to charge against the Shawnees the full $829,000.00 but rather the consideration paid should be valued at its present worth as of the date of the treaty of cession, or $635,265.66. This method of attempting to reduce the actual consideration paid under the provisions of a treaty was rejected by this Commission in *The Crow Tribe* v. *The United States*, 6 Ind. Cl. Comm. 98, 124, 125, as an attempt to obtain interest where none was provided for or could be allowed. In the negotiation of the Shawnee treaty of

1854, here involved, it should be pointed out, the question of the number of payments under the treaty was a matter of bargaining between the parties with the United States finally agreeing to the number insisted upon by the Indians.

The Commission, taking into consideration the many factors relative to the value of the Shawnee Tract in 1854 as set forth herein and in more detail in the findings of fact; the fact that the purchase would be of a large tract including the less valuable lands in the western portion; the history of settlement and sales of the tract as a whole; the pattern of settlement in adjoining lands in Missouri, and the appraisals and sales of the Peoria and Delaware tracts making due allowance for differences in size and conditions existing in 1854 which could not have been reasonably foreseen at that time, concludes that as of August 2, 1854, the day on which the treaty became effective and title passed to defendant, the fair market value of the Shawnee Tract, consisting of 1,404,790 acres, was $1,938,464.00. This total sum is arrived at by placing a fair market value on the more valuable eastern portion of the Shawnee Tract, consisting of 932,138 acres, of $1,631,241.00, or at the rate of $1.75 per acre, and a fair market value on the 472,652 acres in the western third of the tract of $307,223.00, or at the rate of sixty-five cents per acre. The consideration of $829,000.00 paid for the Shawnee Tract was unconscionable.

Counsel for petitioner close their brief with this amazing statement:

> For the purpose of this case, petitioners are assuming that the Shawnees received the consideration which is provided for them in the treaty of 1854, leaving the question as to whether they actuall received it to the petition for an accounting.

To give effect to the statement we would be required to give an opinion on an abstract proposition of law.

A real controversy exists which is whether the consideration the petitioner received for its lands was unconscionable. To decide this issue it is necessary to determine the consideration the defendant paid for the lands and their value at the time the Indians' title passed to defendant. We have decided the value of the land. There was no proof offered as to the consideration paid, nor was such proof needed, because the petitioner has alleged that the consideration paid was $829,000.00, which the defendant has admitted in its answer. Obviously, unless the consideration for the cession was proved by admissions in the pleadings the petitioner has not made out a case. We think the admissions in the pleadings, mentioned above, show that petitioner received the consideration stated in the treaty. We will, accordingly, make a final award based upon the consideration shown by the pleadings, less such offsets as may hereafter be allowed. Such final award will, we believe, remove the question of the amount of the consideration paid for the 1854 cession from the petition for an accounting mentioned by petitioner in its brief.

LOUIS J. O'MARR,
Associate Commissioner.

We concur:
EDGAR E. WITT,
Chief Commissioner.
WM. M. HOLT,
Associate Commissioner.

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